United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-6139

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Appeal Docket No. 76-6139

B

P/B

JAMES F. REGAN,

Plaintiff-Appellant

-against-

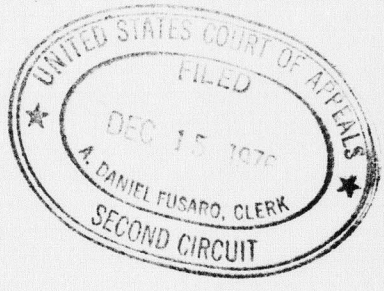
JOSEPH F. SULLIVAN, GEORGE VAN NOSTRAND, FRANCIS R. JULES, and DONALD J. GRATTAN,

Defendants-Appellees

and

JOHN CALLAGHAN, individually and as a member of The New York City Police Department, JAMES M. HARKINS, individually and as a member of The New York City Police Department and HOWARD GREENWALD, individually and as a member of The New York City Police Department,

Defendants



On Appeal from the United States District Court For the Eastern District of New York

REPLY BRIEF OF PLAINTIFF-APPELLANT

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ARGUMENT

POINT I

THE DISTRICT COURT SHOULD HAVE APPLIED THE NEW YORK THREE-YEAR STATUTE OF LIMITATIONS TO THE BIVENS CLAIM, EITHER AS THE MOST APPROPRIATE STATE STATUTE OR IN THE EXERCISE OF ITS POWER TO FASHION A SPECIAL FEDERAL LIMITATIONS PERIOD

The federal defendants completely misconstrue plaintiff's arguments on appeal. Plaintiff does not quarrel with the Supreme Court's and this Court's oft-held rulings that where there is "no specifically stated or otherwise relevant federal statute . . . the controlling period would ordinarily be the most appropriate one provided by state law," Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975); Fine v. City of New York, 529 F.2d 70 (2d Cir. 1975), and where special federal considerations are present, the courts will apply a special federal limitations period. Chevron Oil Co. v. Huson, 404 U.S. 97, 104 (1971); McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958).

Plaintiff argues that the District Court erred in choosing a one-year statute of limitations applicable to sheriffs, constables, and coroners as the most appropriate state statute of limitations, especially in light of the fact that this Court has consistently held that claims under 42 U.S.C. § 1983, to which a Bivens claim under the Fourth Amendment is most analogous, are measured by th three-year statute under New York law, CPLR 214(2), see Rosenberg v. Martin, 478 F.2d 520 (2d Cir. 1973); Romer v. Leary, 425 F.2d 186 (2d Cir. 1970).

Alternatively, plaintiff argues that the District Court erred in rejecting the opportunity to apply a special federal limitations period based upon either the same statutory period as applied in Section 1983 actions or upon the Federal Tort Claims Act.

1. The District Court Did Not Apply the Most Appropriate State Limitations Period.

The cases cited by defendants at page 5 of the brief* to support the proposition that the most analogous state statute should be applied are in fact supportive of plaintiff's arguments. Defendants fail to mention that in those cases and others, this Court consistently applied a three-year, not a one-year, limitations period to Section 1983 claims, which are premised, as the Bivens claim is, on deprivation of Constitutional rights.

In Lombard v. Board of Education of the City of New York, 407 F. Supp. 1166 (E.D.N.Y. 1976), the District Court indicated that a statute of limitations other than the three-year period should be applied to a Constitutional claim similar to a Section 1983 claim. However, that claim was against a munici-

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* Plaintiff wishes to point out to the Court that the federal defendants originally served upon plaintiff a printer's proof of its brief. Thereafter, after the date set by the Court to file appellees' brief, defendants served a final brief which differed significantly in content from the printer's proof, and included a total of five additional pages and new arguments in a brief now only twenty pages long. The final brief not only added arguments but misquotes and miscites cases, making the arguments difficult to comprehend. Plaintiff objects to the rather cavalier treatment accorded him by defendants, and urges that the Court take notice of the practices of defendants which are not condoned in any way by rules known to plaintiff.

pality where a state statute of limitations "clearly and specifically", Johnson v. Railway Express Agency, supra, provided for a statute of limitations for claims for damages arising out of negligence or wrongful acts of the city. See Fine v. City of New York, supra. Furthermore, since a municipality is not a "person" for Section 1983 purposes, neither the Lombard nor Fine Courts were faced with the situation, presented here, of viable Section 1983 and Bivens claims in the same action.*

In addition, in Point II defendants seek strictly to analogize FBI Agents and Customs Agents to "sheriffs" under the law of New York State, who are covered by the one-year statute of CPLR § 215(1).** However, this Court has already ruled that federal law enforcement agents, sued in Bivens actions, must be treated in the same manner, with the same defenses, as "police officers" sued at common law or in § 1983 actions. Bivens v. Six Unknown Agents, 456 F.2d 1339, 1347 (2d Cir. 1972). In Romer v. Leary, 425 F.2d 186 (2d Cir. 1970), Ortiz v. LaVallee, 422 F.2d 912 (2d Cir. 1971), and Kaiser v. Cohn, 510 F.2d 282 (2d Cir. 1974), all cases involv-

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* In Felder v. Daley, 403 F. Supp. 1324 (S.D.N.Y 1975), discussed at p. 13 of plaintiff's principal brief, the District Court applied the "intentional tort" analogy which has implicitly been rejected by this Court.

** In the course of arguing Point II, defendants state that "at the time of the acts complained of in the complaint there was no federal liability for such acts." The point being made by defendants is not clear, but the facts asserted are simply not true. The acts complained of arose in November 1973 and extended through the Spring of 1974; the liability for those acts stems from the Bivens case in the United States Supreme Court which was decided in 1971, Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

ing law enforcement officials as defendants in § 1983 actions, this Circuit applied the New York three-year statute of limitations for liabilities created by statute. The same should be applied in a Bivens action.

Furthermore, defendants' substantive argument in Point II that since FBI and Customs agents have the general powers as U. S. Marshalls, who in turn are given the same powers as state sheriffs, and that therefore the one-year limitations period applicable to sheriffs must be applied to the FBI and Customs agents, has no weight. The New York Court of Appeals has stated that the "office of sheriff is of great antiquity and peculiar." Matter of Flaherty v. Milliken, 193 N.Y. 564, 567 (1908). The Court also has held that "the office or position of sheriff . . . through the centuries, has had fundamental characteristics and a recognized singularity." Matter of Grifenhagen v. Ordway, 218 N.Y. 451, 455 (1918). In addition, the office of Sheriff in New York has "duties prescribed by law as an officer of the court and conservator of the peace within the county . . . [he has] status as an independent agent or as a separate adjunct of the courts and of the state . . ." Isereau v. Stone, 207 Misc. 941, 949, 950 (Sup. Ct. Onondaga Cnty 1955), aff'd in part, rev'd on other grounds, 3 A.D.2d 243 (4th Dept. 1957).

In light of these distinctions and peculiarities, it is clear that the one-year statute applicable to sheriffs is not "clearly and specifically" applicable to the federal defendants here, Johnson v. Railway Express Agency, supra,

and thus is not the most appropriate.

Defendants alternatively argue that the one-year statute applicable to false arrests should be applied. This point is extensively dealt with in plaintiff's principal brief and will not be reargued here, except to note that this Court has refused to apply the "intentional tort" analogy to § 1983 actions and has instead applied the three-year statute, C.P.L.R. § 214(2).

In Allen v. Butz, 390 F. Supp. 836, 840 (E.D.Pa. 1975), the Court held that where a Constitution-based claim under the Fifth Amendment is joined with an analogous statutory claim under 42 U.S.C. § 1981 arising out of the same act, the applicable limitations period for the Constitution-based claim is that applied to the analogous claim. This Court should adopt the same rationale and apply to the Constitutional claim the three-year period which has consistently been applied and was here applied to the § 1983 claim, viz., CPLR § 214(2).

Defendants argue that CPLR § 214(2) is inapplicable because the U. S. Constitution is not a "statute," citing and quoting United States v. Cooper Corporation, 114 F.2d 413, 414 (2d Cir. 1940), aff'd, 312 U.S. 600 (1941), for that proposition. In United States v. Cooper Corporation, supra, this Court was faced with the question of whether the United States was a "person" within the meaning of Section 7 of the Sherman Act, giving the right to recover treble damages to a "person . . . injured in his business or property." The Court held that "person" did not include the United States because

the United States was not an entity "existing under . . . the laws of . . . the United States . . ." In so holding, the Court made the distinction partially quoted by defendants, but defendants omitted to quote to the Court the most significant portion of the Court's distinction between Constitution and statutes. In full, the Court stated:

> "[The United States] exists as a government of delegated powers by virtue of the constitution and while that is sometimes classed as among the laws of the United States in that it may be said to be the supreme law of the land it is not of a kind with specific laws passed in accordance with its provisions which relate to the creation, existence and control of corporate bodies" (Emphasis added to that portion of the quotation deleted from defendants' brief), 114 F.2d at 414.

This distinction makes clear that this Court then felt that, insofar as statutes authorize the creation and establishment of corporate bodies, the United States Constitution cannot be said to be that kind of statute. However, insofar as statutes create rights and liabilities, and the Constitution creates rights and liabilties, there can be no real issue but that the Constitution stands in exactly the same position as a statutory claim, and that CPLR § 214(2) should be equally applicable. See Bivens v. Six Unknown Named Agents, supra at 396; Bell v. Hood, 327 U.S. 678, 684 (1946).

Accordingly, the Court should reverse the District Court's holding that CPLR § 215(1) is the most analogous state statute and should hold that the three-year statute under CPLR § 214(2) is most appropriate.

2. Alternatively, the District Court Should Have Applied a Special Federal Limitations Period.

Defendants fail to distinguish the decisive case of McAllister v. Magnolia Petroleum Co., supra, in which the Court held that a judicially-created unseaworthiness claim could not have a shorter limitations period than a Congressionally-created Jones Act claim. Of course, this is exactly analogous to the judicially-created Bivens claim and Congressionally-created § 1983 claim as to which the lower court erroneously applied different statutes of limitation. The concurring opinion of Justice Brennan clarifies this point by stressing that, in the absence of a fixed federal limitations period set by Congress the federal courts have the inherent power to create special limitations periods for judicially-created rights by reference to other analogous federal rights, 357 U.S. at 228-9.

Defendants erroneously argue that in order to fashion a federal limitations period nationwide uniformity must be accomplished. As demonstrated in the plaintiff's brief, it is just as desirable within our federal system to have uniformity within each state; this type of uniformity would be achieved by the application of a federal rule where the same state limitations period applied in each state to § 1983 claims would be applied to Bivens claims.

Furthermore, even if the Court were to conclude that nationwide uniformity must be accomplished, plaintiff has sug-

gested that creating a limitations period modelled after the Federal Tort Claims Act would have the desired result. Defendants strongly attack that view in their brief, but it has recently come to plaintiff's attention that the Federal Government, in moving to dismiss a Bivens-type claim in the Federal Court in the District of Columbia, proposed just such uniformity for Bivens claims modelled after the Federal Tort Claims Act. See Federal Defendants' Brief in Hedrick Smith v. Nixon, et al., Civil Action No. 76-0798 (D.C.D.C.) (annexed hereto as Exhibit B).

In Smith v. Nixon, an action arising out of the allegedly illegal wiretapping of a reporter and asserting both a statutory claim and a Bivens claim, the Government urged that the "same limitations period [be applied] to constitution-based claims which arise out of the same instance [as the statutory claims]" (Defendants' Brief, p. 8). In its brief, the Government urged, among other periods to be applied, that the Court apply the District of Columbia three-year period for claims "for which a limitations period is not otherwise specifically prescribed," or, if the Court believed that it "must look for a comparable Federal statute," the two-year period for filing administrative claims under the Federal Tort Claims Act, 28 U.S.C. 2401(b). Accordingly, the Court could look to the Federal Tort Claims Act, in a manner suggested in plaintiff's principal brief, as a model for nationwide uniformity.

POINT II

DEFENDANTS ARE EQUITABLY ESTOPPED FROM ASSERTING THE BAR OF THE STATUTE OF LIMITATIONS

Defendants do not adequately respond to plaintiff's argument that a federal tolling provision should be fashioned because of defendants' conduct and acts herein. Even if not fraudulent in scope, defendants have, as stated in plaintiff's brief, and as argued below on motion to reargue, acted and have continued to act in such a way as to prevent plaintiff from learning the true facts surrounding his arrest.

It was only during the time plaintiff submitted to the U. S. Attorney the detailed affidavits of plaintiff's whereabouts on the evening of the robbery did plaintiff's counsel learn that virtually no investigation had been done by the Federal Government of plaintiff's co-workers prior to the arrest (A-76). Furthermore, defendants have steadfastly insisted to the District Court and to plaintiff that the arrest was based upon an eyewitness identification. Only recently has plaintiff learned that the so-called eyewitness identification was really a voice identification based upon a witness' recollection of a robber's voice later thought to be similar to plaintiff's voice.

It is now clear to all that plaintiff was not involved in the armed robbery, but even a plaintiff sure of his own innocence hesitates to sue federal officials who

assert in court that an arrest is based on probable cause and an eyewitness identification.

By these acts, defendants are barred from asserting the statute of limitations under the doctrine of equitable estoppel. The doctrine of equitable estoppel holds that "'[a] defendant may be estopped by his . . . conduct from asserting the bar of the statute of limitations.'" Hart v. Johnston, 389 F.2d 239, 241 (6th Cir. 1968). Thus, if a party, by his words, acts and conduct led another not to bring suit within a limitations period, he cannot raise the defense that the suit is barred. See United States v. Reliance Insurance Co., 436 F.2d 1366 (10th Cir. 1971); Florio v. General Accident Fire & Life Assurance Corp., 396 F.2d 510 (2d Cir. 1968).

The Supreme Court said in Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231, 232-233 (1959):

> "To decide the case we need look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations."

Finally, since the Federal Government has apparently maintained many contemporaneous memoranda of the incidents leading up to the plaintiff's arrest, which it now refuses to disclose, there can hardly be a fear that a longer statute of limitations would contribute to the arresting agents' "memories [becoming] dim and witnesses and records perhaps not available,"

as the District Court opined (A-70).

Accordingly, either by fashioning a tolling provision or by relying upon the doctrine of equitable estoppel, the Court should reverse the District Court's dismissal of the Bivens claims here.

CONCLUSION

For reasons and arguments stated, the District Court's order of August 2, 1976, dismissing plaintiff's Bivens claims against the federal defendants should be reversed , and the amended complaint reinstated.

Dated: New York, New York
December 14, 1976

Respectfully submitted,

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EXHIBIT B: COPY OF THE FEDERAL DEFENDANTS' MOTION TO DISMISS, SMITH V. NIXON, CIVIL ACTION NO. 76-0798, U.S.D.C., DISTRICT OF COLUMBIA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HEDRICK SMITH, et al., Plaintiffs,	)	
v.	)	Civil Action No. 76-0798
RICHARD M. NIXON, et al., Defendants.	)	

FEDERAL DEFENDANTS' MOTION TO DISMISS

Come now Federal defendants Richard M. Nixon, Henry A. Kissinger, H.R. Haldeman, John Ehrlichman, William C. Sullivan, Cartha D. DeLoach, Clarence M. Kelley, and Edward H. Levi, by their undersigned attorneys, and pursuant to Rule 12 (b)(6), move the Court to dismiss the complaint herein as time-barred by the running of the statute of limitations. Additionally, comes now Federal defendant Henry A. Kissinger, by his undersigned attorneys, and pursuant to Rules 12(b)(2) and 12(b)(5), moves the Court to dismiss the complaint as to him in his individual capacity on the further ground that the Court lacks in personam jurisdiction because of insufficiency of service of process.

In support hereof, the Court's attention is respectfully directed to the attached memorandum of points and authorities.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HEDRICK SMITH, et al., Plaintiffs, v. RICHARD M. NIXON, et al., Defendants.	)	Civil Action No. 76-0798

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF FEDERAL DEFENDANTS' MOTION TO DISMISS

TABLE OF CASES AND AUTHORITIES

*Cases and authorities chiefly relied upon.

Constitution, Statutes, Rules and Regulations:

Cases: Page:

Miscellaneous:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HEDRICK SMITH, et al., Plaintiffs,	)	
v.	)	Civil Action No. 76-0798
RICHARD M. NIXON, et al., Defendants.	)	

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF FEDERAL DEFENDANTS'
MOTION TO DISMISS

Plaintiffs allege that from June 4, 1969 to August 31, 1969, their residence telephone in Washington, D.C., was the subject of a warrantless electronic surveillance. [Comp. at ¶¶ 19, 22, 25.] Nearly seven years later, on May 10, 1976, plaintiffs initiated this action for damages as a result of the alleged 1969 electronic surveillance.

By their action, plaintiffs seek actual and punitive damages from a former President of the United States, the President's National Security Advisor, the Attorney General,[1/] other chief Presidential advisors, and high level officers of the Federal Bureau of Investigation.[2/] In addition to the electronic surveillance, plaintiffs allege that disclosures of information obtained

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1/ Court records do not reflect any service of process on former Attorney General Mitchell in this action.

2/ Also named as defendants are Attorney General Levi and FBI Director Kelley, in their capacities as custodians of the records of the alleged surveillance. Plaintiffs ask that these defendants be enjoined from further interception and use and disclosures, and that the Court direct the defendants to hand over to plaintiffs all pertinent records and logs. Plaintiffs do not seek damages from
(footnote continued on next page)

pursuant to the surveillance were made to executive officers during the 89 day period in 1969, in June 1970, and sometime in 1971. [Comp. at ¶¶ 22-26, 28, 30.] Plaintiffs claim the surveillance violated 18 U.S.C. §§2510-20 [Title III of the Omnibus Crime Control and Safe Streets Act of 1968] and the First, Fourth, and Ninth Amendments.

Specifically, plaintiffs are alleging that a surveillance was initiated ". . . for the purpose of monitoring the sources of plaintiff HEDRICK SMITH'S news stories which were personally embarrassing to high government officials but which did not constitute violations of national security laws or regulations." [Comp. at ¶ 33.] Plaintiffs further allege that the 89 day surveillance in the Summer of 1969 resulted from a program of electronic surveillance, specifically that:

> . . . sometime in April, 1969 in Washington, D.C. defendants KISSINGER, NIXON, MITCHELL and the late J. Edgar Hoover, former Director of the Federal Bureau of Investigation, decided and agreed at the personal direction of the defendant Nixon to conduct electronic surveillance of certain persons, includ-

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2/ (footnote continued from previous page)

these defendants. Plaintiffs also named four 'John Doe' defendants as well as one corporate defendant, the Chesapeake and Potomac Telephone Co.

For reasons similar to those stated in the text infra, plaintiffs' claim for equitable relief, arising out of an act which allegedly took place seven years ago, is barred by laches, particularly considering the absence of any allegations by plaintiffs of either present harm or chill or of any reasonable liklihood of future harm or chill. See generally, James v. Ambrose, 367 F. Supp. 1321, 1327 (D.V.I. 1973); Laird v. Tatum, 408 U.S. 1 (1972).

ing employees of the National Security Council, other government agencies, and newspersons writing about the conduct of foreign affairs. [Comp. at ¶ 17.][3/]

3/ This allegation appears to have reference to President Nixon's May 22, 1973 Statement that:

> By mid-1969, my Administration has begun a number of highly sensitive foreign policy initiatives. They were aimed at ending the war in Vietnam, achieving a settlement in the Middle East, limiting nuclear arms, and establishing new relationships among the great powers. These involved highly secret diplomacy. They were closely interrelated. Leaks of secret information about any one could endanger all.
>
> Exactly that happened. News accounts appeared in 1969, which were obviously based on leaks - some of them extensive and detailed - by people having access to the most highly classified security materials.
>
> There was no way to carry forward these diplomatic initiatives unless further leaks could be prevented. This required finding the source of the leaks.
>
> In order to do this, a special program of wiretaps was instituted in mid-1969 and terminated in February 1971. Fewer than 20 taps, of varying duration, were involved. They produced important leads that made it possible to tighten the security of highly sensitive materials. I authorized this entire program. Each individual tap was undertaken in accordance with long-standing precedent.
>
> The persons who were subject to these wiretaps were determined through coordination among the Director of the FBI, my Assistant for National Security Affairs, and the Attorney General. Those wiretapped were selected on the basis of access to the information leaked, material in security files, and evidence that developed as the inquiry proceeded.
>
> Information thus obtained was made available to senior officials responsible for national security matters in order to curtail further leaks.

[9 Presidential Documents at 694 (1973).] Of course, whether or not this is, in fact, the case is not material to the statute of limitations issue at bar.

Pursuant to stipulation of counsel, and with the approval of the Court, Federal defendants' time in which to answer or otherwise respond to the complaint was extended to September 1, 1976. For the following reasons, defendants submit that this 1976 action for an alleged 1969 surveillance should be dismissed as time-barred by the running of the statute of limitations. Additionally, defendant Kissinger submits the court lacks in personam jurisdiction as to his individual capacity, because service of process was insufficien

DISCUSSION

I. THE COMPLAINT SHOULD BE DISMISSED AS BARRED BY THE RUNNING OF THE STATUTE OF LIMITATIONS.

The complaint at bar is facially defective. Plaintiffs are complaining of a 1969 electronic surveillance. At the most, the limitations period for such actions is three years. Because plaintiffs have not alleged any exception which would have tolled the running of the limitations period and cured this defect, their claim is time-barred. Dismissal is therefore required.

A. The statute of limitations has run on a claim arising from a 1969 electronic surveillance.

Plaintiffs waited almost seven years after they claim they were the subject of electronic surveillance before bringing this action. Defendants submit that that claim is stale and, accordingly, the Court need not reach the merits of the case but must dismiss the complaint at this time.

The threshold question for the Court is which statute of limitations should be applied to an action seeking damages for electronic surveillance. Plaintiffs assert jurisdiction under

18 U.S.C. §2520 and certain amendments to the Constitution.[4/] However, neither the statute nor, of course, the Constitution provides a limitations period. The Supreme Court in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), stated the test in this situation -- when federally-created rights do not have a corresponding limitations provision -- to be:

> . . . when a federal statute creates a wholly federal right but specifies no particular statute of limitations to govern actions under the right, the general rule is to apply the state statute of limitations for analogous types of actions. See Auto Workers v. Hoosier Corp., 383 U.S. 696; Cope v. Anderson, 331 U.S. 461; Campbell v. Haverhill, 155 U.S. 610; Note, Federal Statutes Without Limitations Provisions, 53 Col. L. Rev. 68 (1953). A special federal statute of limitations is created, as a matter of federal common law, only when the need for uniformity is particularly great or when the nature of the federal right demands a particular sort of statute of limitations. See Holmberg v. Armbrecht, 327 U.S. 392; McAlister v. Magnolia Petroleum Co., 357 U.S. 221.

Id. at 104. See generally Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 462 (1975); Macklin v. Spector Motor Freight, 478 F.2d 979, 994 (D.C. Cir. 1973).

Placed in the context of the case at bar, then, Chevron Oil requires the Court to either apply the most applicable District of Columbia limitations statute or, if there is any particular need for uniformity in the electronic surveillance area, then to adopt the limitations period of the most comparable Federal statute, if any.

4/ The constitution-based damages cause of action derives from the decision in Bivens v. Six Unknown Agents of Fed. Bur. of Narcotics, 403 U.S. 388 (1971). But cf., Morales v. Hamilton, 391 F. Supp. 85 (D. Ariz. 1975) (holding that such actions cannot be created by retroactive application of a Supreme Court decision in an area of first impression).

It should be noted that all electronic surveillances would not necessarily be governed by Title III. For example, the Supreme Court has held that Congress in enacting that statute ". . . simply did not legislate with respect to national security electronic surveillances." United States v. United States District Court, 407 U.S. 297, 306 (1972); see also United States v. Smith, 321 F. Supp. 424 (C.D. Cal. 1971); but compare the plurality opinion in Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975).

Although the Court may conclude that there is a need for uniformity in this area and, therefore, adopt the two year limitation period of the analagous Federal Tort Claims Act,[5/] as we discuss in Part B, infra, even under the most liberal limitations provision, plaintiffs' claim is time-barred.

1. Turning first to the District of Columbia Code, there are two limitations periods which are arguably applicable to plaintiffs' statutory claim under Title III. One is §12-301(5), providing a one year limitations period ". . . for a statutory penalty or forfeiture." Another is §12-301(8), providing a three year limitations period for claims ". . . for which a limitations period is not otherwise specifically prescribed." Defendants urge the Court to conclude that, if state law is to be applied, the one year period for statutory penalty actions is most analogous to Title III's civil remedy, providing as it does punitive damages for violations of the statute.

The question is whether a punitive damages provision constitutes a penalty, as that term is used in §12-301(5). By its very term:

> . . . the word, 'penalty,' strictly and primarily denotes punishment, imposed and enforced by the state, for an offense against its laws. It also commonly is used as including any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered.

United States v. Witherspoon, 211 F.2d 858, 861 (6th Cir. 1954). Punitive damages provisions fit this definition, for:

> [t]he award of punitive damages . . . would have nothing to do with recompense to an aggrieved individual . . . . [Punitive damages] are classically considered an extraordinary sanction available only on aggravated circumstances, to penalize a party for engaging in notably reprehensible conduct.

Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists, 401 F.

5/ 28 U.S.C. §§2671-80.

Supp. 1361, 1370 (S.D.N.Y. 1975). Recently, the Supreme Court reiterated this principle that punitive damages ". . . are not compensation for injury . . . . [i]nstead they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." Gertz v. Welch, 418 U.S. 323, 350 (1974); see also Nader v. Allegheny Airlines, 512 F.2d 527, 549 (D.C. Cir. 1974); Herman v. Hess Oil Virgin Islands Corp., 524 F.2d 767, 772 (3d Cir. 1975). And because the purpose of punitive damages, unlike compensatory damages, is to deter ". . . the defendant and others similarly situated",[6/] then ". . . the benefit which the plaintiff receives [from an award of punitive damages] is incidental and, in a sense, a windfall." Davidson v. Dixon, 386 F. Supp. 482, 490 (D. Del. 1974).

The legislative history to Title III reflects that the Act's civil remedy provision was designed to have just such a deterrent purpose, as a part of the overall legislative scheme:

> The prohibition, too, must be enforced with all appropriate sanctions. Criminal penalties have their part to play. But other remedies must be afforded the victim of an unlawful invasion of privacy. Provision must be made for civil recoupment for damages. The perpetrator must be denied the fruits of his unlawful actions in civil and criminal proceedings.

[S. Rep. 1097, 90th Cong., 2d Sess. (1968); 2 U.S. Code Cong. & Adm. News 2112, 2156 (1968)] [hereinafter, S. Rep. 1097].

The cases construing §12-301(5) support the contention that a statute providing punitive damages provides a penalty. In Kemp v. Board of Medical Supervisors, 46 App. D.C. 173 (D.C. Cir. 1917),

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6/ Morris v. Bd. of Educ. of Laurel School Dist., 401 F. Supp. 188, 215 n. 39 (D. Del. 1975).

for example, the Court stated that the term 'penalty' would ". . . relate to a statutory forfeiture of money payable as a punishment for a violation of a statute."[7/] Id. at 180. More to the point is Heitmuller v. Berkow, 165 F.2d 961 (D.C. Cir. 1948), which dealt with the question whether a double recovery provision in a Rent Act constituted a penalty within the meaning of the statute of limitations. The Court of Appeals held that it was not a penalty, but did so only by taking pains to construe the double recovery provision as a compensatory remedy:

> This provision, read in context, largely compels our decision that the Rent Act creates a statutory obligation to pay compensatory damages and not a penalty, at least, to the extent the statute of limitations drawn in issue here is concerned. [emphasis added]

Id. at 964. The Court of Appeals determined that the double recovery provision was compensatory instead of punitive by concluding that Congress' purpose in providing for such recovery was to compensate for the cost of bringing small claims to court. Of course, that "cost" is accounted for in Title III by both §2520's liquidated damages provision and the attorney's fees provision.

The limitations period under the District of Columbia Code which would be most applicable to plaintiffs' Title III claim, then, would be the one year period provided by §12-301(5) for statutory penalities. Likewise, defendants urge the Court to apply the same limitations period to constitution-based claims which arise out of the same instance -- here, the alleged electronic surveillance in 1969. This result would not only serve to further the purposes of uniformity in the law Congress intended by enacting

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7/ As the prior discussion in the text reflects, it is of no matter that the penalty is paid to a private person who becomes the recipient of a 'windfall' rather than being paid to a governmental entity. See Schaefer v. H.B. Green Transp. Line, 232 F.2d 415, 418 (7th Cir. 1956).

Title III,[8] but it would be consistent with those cases which had to adopt limitations provisions for such constitution-based actions. In both Allen v. Butz, 390 F. Supp. 836, 841 (E.D. Pa. 1975) and Fine v. City of New York, 529 F.2d 70, 76 (2d Cir. 1975), for example, the courts held that the applicable limitations period for the constitution-based claim before the Court (Fifth and Fourteenth Amendment claims, respectively) would be the same as that applied to the plaintiff's analogous claim which arose out of the same act.

Accordingly, if state law is applied to determine the applicable limitations period, then defendants urge the Court to conclude that the most analogous limitations period is that provided in §12-301(5).[9]

2. Of course, as the Supreme Court's statement in Chevron Oil quoted previously reflects, if a Federal statute lacking a corresponding limitations period has a particular need for uniformity in the law, a court is to turn to the most analogous Federal law, if any, and adopt that statute's limitations period. 404 U.S. at 104.

Defendants believe the Court can conclude, in the alternative, that Title III does present a situation where ". . . the need for uniformity is particularly great . . . ." 404 U.S. at 104. This much would appear to be evidenced by the legislative history of that enactment, which states a primary purpose to be:

8/ See S. Rep. 1097 at 1097.

9/ If the Court finds that statute is not sufficiently analogous then the applicable period under state law would be the three year period provided by the residual provision [§12-301(8)] for claims ". . . for which a limitations period is not otherwise specifically prescribed." In any event, for the reasons discussed above, whatever limitations period the Court chooses to apply to the statutory claim, the same should be applied to the constitution-based claims.

> The need for comprehensive, fair and effective reform setting the uniform standards is obvious. New protections for prinvacy must be enacted. Guidance and supervision must be given to State and Federal law enforcement officers. This can only be accomplished through national legislation. This the subcommittee proposes.

[S. Rep. 1097 at 2156.]

There is, moreover, a particular need for uniformity of the law in the context of civil actions brought under the Act. First, Congress intended that the civil remedy provisions of §2520 would be an integral part of the overall legislative scheme:

> The prohibition, too, must be enforced with all appropriage sanctions. Criminal penalties have their part to play. But other remedies must be afforded the victim of an unlawful invasion of privacy. Provision must be made for civil recourse for damages. The perpetrator must be denied the fruits of his unlawful actions in civil and criminal proceedings. Each of these objectives is sought by the proposed legislation.

[S. Rep. 1097 at 2156.] Secondly, however, it cannot be forgotten that one other purpose of Title III was to permit electronic surveillance so that its fruits could be used in court proceedings -- contrary to the prior prohibition on disclosure contained in 47 U.S.C. §605 (1964). To this end, Congress sought to balance individual privacy interests with legitimate law enforcement interests by establishing uniform standards for the conduct of electronic surveillance in order to give "[g]uidance and supervision" to the State and Federal law enforcement officers. [S. Rep. 1097 at 2156.]

One concern, of course, was in ensuring that law enforcement officers not be inhibited from seeking electronic surveillance in appropriate cases by uncertainty in the law. As Senator Pastore observed in debate on an amendment (subsequently defeated) which would have allowed states to set electronic surveillances standards that were more stringent than Title III standards:

> . . . then an FBI agent could be prosecuted in the State or not prosecuted in the State depending on what the State did with reference to a wiretap. So that I do not know how we will get Federal officials . . . to come in and do their job. [sic] [emphasis added]

114 Cong. Rec. 14,795 (1968). Applying over fifty local statutes of limitations to Title III would not only defeat the intended uniformity, it would have a deleterious effect on the repose and reliance interests of law enforcement officers who must, in the public interest, seek electronic surveillance pursuant to the statute.[10/] Indeed, such a result would only encourage forum-shopping, contrary to the stated congressional intent to establish uniform standards for the guidance and supervision of just such officers. But as Justice Brennan observed in McAlister v. Magnolia Petroleum Co., 357 U.S. 221 (1958) (Brennan, J., concurring):

> The alternative of subjecting the parties' rights to the variant of state statutes of limitations could inject any unnecessary sporting element into the affairs of men. Cf. Guaranty Trust Co. v. York, 326 U.S. 99. The mischief to be avoided is the possibility of shopping for the forum with the most favorable period of limitations.

Id. at 229-30. This possibility of forum-shopping is particularly real when the Court considers that in any given situation where the Attorney General authorizes obtaining an electronic surveillance pursuant to Title III, jurisdiction in a subsequent damages suit may lie not only in the District of Columbia but where the surveillance or interception actually took place, where all the defendants reside, or possibly where there were disclosures of the fruits of the surveillance.

10/ For example, actions brought in Virginia would be subject to a two year period [Va. Code ch. 8, §24], while actions in Wisconsin would be subject to a six year period [Wis. Stats. Ann. §893.19(4)] and actions brought in Georgia would be subject to arguably either a twenty or a two year period [cf., Ga. Code Ann. §§3-704 and 3-1004].

Consequently, there is an expression of congressional intent to have uniformity in the law with respect to Title III, and, therefore, the Court must look for a comparable Federal statute to adopt that statute's limitations provision here. That statute is, in our view, the Federal Tort Claims Act, involving as it does claims arising out of acts taken by government employees in their governmental capacities. Cf., Fine v. City of New York, 529 F.2d 70, 76 (2d Cir. 1975) (applying city's tort claims act to a 42 U.S.C. §1981 suit). To this end, Judge Wright's observation in Zweibon v. Mitchell, supra, is instructive:

> Although the language of the [1974 amendment to the Tort Claims Act] does not appear to encompass illegal nontrespassory electronic surveillance, Congress clearly indicated that such situations were in fact within the ambit of the Act. See 1974 U.S. Code Cong. & Adm. News, pp. 2789, 2791 (S. Rep. No. 588, 93rd Cong., 2d Sess. (1974) ("it is the intent of the Committee [on Government Operations] that these borderline cases under the present law, such as trespass and invasion of privacy, would be viewed as clearly within the scope of the Federal Tort Claims Act"). [emphasis added]

516 F.2d at 605 n.9. As the Senate Report on Title III reflects, of course, one of the overall concerns prompting the Act also was to establish "[n]ew protections for privacy." [S. Rep. 1097 at 2156.]

Accordingly should the Court conclude that the Congress' intent in enacting Title III to establish a uniform law in the electronic surveillance area supports application of a uniform period of limitations for damages actions brought under that statute, then the Court should adopt the limitations period applied to claims

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11/ Although both Title III and the 1974 amendment to the Federal Tort Claims Act concern privacy interests, defendants do not necessarily agree with Judge Wright's further conclusion that the Federal Tort Claims Act would now provide a cause of action for damages against the United States for post-1974 electronic surveillances. However, because plaintiffs allege a 1969 surveillance, that is not an issue in this case.

arising under the Federal Tort Claims Act. The applicable period for such claims is two years, as provided by 28 U.S.C. §2401(b).[12/]

B. Dismissal is appropriate in view of the running of the statute of limitations.

Whether the Court adopts a two year limitations period or, by applying state law, a one or three year period, the Court must conclude that the plaintiffs' claim herein is time-barred. They did not initiate this suit until almost seven years after the alleged electronic surveillance, well beyond even the three year period provided by D.C. Code §12-301(8). And while plaintiffs also allege disclosures were made of the fruits of the surveillance, even assuming arguendo that such disclosures would start the limitations period running anew as to the initial surveillance, that is of no matter here because plaintiffs do not allege any disclosures were made after 1971, nearly four and one half years before the complaint was filed.

Under these circumstances, the complaint must be dismissed as facially defective. Indeed, the Court need not even decide which of the three limitations periods should be applied. As the Court concluded in Duisen v. Administrator and Staff, Fulton State Hospital No. 1, Fulton, Missouri, 332 F. Supp. 125, 127 (W.D. Mo. 1971):

> Assuming, without holding, that this staute [of limitations] is applicable, the present complaint was filed more than five years after the alleged beating. It must therefore be regarded as barred by the statutes of limitations . . . . a plaintiff has the burden of stating facts showing that the statute of limitations has not run when the complaint would otherwise show that it has run. Plaintiff does not state whether he is a suitor who can claim the benefit of any type of savings statute or other provision tolling the statute of limitations. [emphasis added]

See also Heard v. Caldwell, 364 F. Supp. 419, 422-23 (S.D. Ga. 1973).

12/ See, note 9 , supra.

Like the plaintiff in Duisen, plaintiffs here do not allege in their complaint any reason why the limitations period might have been tolled as to them.[13/] Specifically, plaintiffs do not allege that they did not have reason to believe they were the subject of electronic surveillance. The complaint is remarkably silent on the question of just when plaintiffs first decided that they might be, or might have been, the subject of electronic surveillance. The absence of this type of allegation is fatal to their complaint, particularly when the Court considers that at least by May 11, 1973, plaintiffs were given adequate notice of the possibility of an electronic surveillance, for in an article dated may 10, 1973, plaintiff Hedrick Smith's employer, The New York Times, reported just that:

> The sources said that three of the reporters placed under surveillance were William Beecher and Hedrick Smith of The New York Times, and Henry Brandon, a correspondent for The Sunday Times of London who is based in Washington.

[N.Y. Times, May 11, 1973, at p. 18 (dated May 10, 1973)] [Attach. 1.] Because it seems highly likely that the Times reporter and staff advised plaintiff of the possible surveillance before the story was printed on May 11, plaintiffs would not be able to allege any exceptions to the running of even the three year statute. Apparently recognizing as much, plaintiff have not made any allegation to except them from the running of the limitations period.

13/ Thus, plaintiffs allegation of fraudulent concealment (albeit in connection with another criminal matter) [Comp. at ¶ 31] is not sufficient. As this Court held in Fitzgerald v. Seasmans, 384 F. Supp. 668 (D.D.C. 1974):

> . . . the fraudulent concealment must actually succeed in precluding the plaintiff from acquiring knowledge of the material facts. Where "the plaintiff knew, that he may have had a cause of action," the claim that the statute of limitations has been tolled by defendants'

(footnote continued on next page)

As the Supreme Court early recognized:

> It is a wise and beneficial law [statutes of limitations], not designed merely to raise a presumption of payment of a just debt, from lapse of time, but to afford security against stale claims demands after the true state of the transaction may have been forgotten or be incapable of explanation by reason of the death or removal of witnesses.

Bell v. Morrison, 26 U.S. (1 Pet.) 351, 360 (1828); see also, Campbell v. City of Haverhill, 155 U.S. 610, 616 (1895).

Because plaintiffs' claim, as alleged in their complaint, is facially time-barred, and in view of the fact that plaintiffs did not allege any exceptions that would have tolled the running of the limitations period, dismissal is required.

II. THE COURT LACKS IN PERSONAM JURISDICTION OVER DEFENDANT KISSINGER IN HIS INDIVIDUAL CAPACITY.

Secretary of State Kissinger is also named as a defendant herein in both his official and individual capacities.[14/] The United States Marshall did not serve Secretary Kissinger personally, but left the summons and complaint with Mr. Eugene Szopa, the Executive Director for the Office of Legal Advisor of the Department of State.

Rule 4, F.R.Civ.P., governs the method of service of process upon defendants in civil actions. Rule 4(d)(1) provides for service of process upon an individual and requires delivery to the defendant personally, delivery to a suitable person at defendant's "dwelling place or usual place of abode," or delivery to an agent authorized to accept service.

13/ (footnote continued from previous page)

> fraudulent concealment of the facts must fail. [emphasis added] [citations omitted]

Id. at 693-94. Significantly, this allegation is missing from their complaint.

14/ Although plaintiffs sue the Secretary of State in his official
(footnote continued on next page)

The service of process upon defendant Kissinger does not meet these requirements of Rule 4(d)(1). Delivery of copies of the Summons and Complaint to the Department of State does not constitute delivery to a suitable person at defendant's "dwelling house or usual place of abode." See e.g., Bell v. Hosse, 31 F.R.D. 181 (M.D. Tenn. 1962), where the Marshall's return indicated service upon three police officers by the leaving of a copy of the Summons and Complaint at the police station; and Cohen v. City of Miami, 54 F.R.D. 724 (S.D. Fla. 1972), where one defendant was purportedly served by the delivery of process to his office. In each of those cases, service of process was held insufficient. See also Tart v. Hudgins, 58 F.R.D. 116 (M.D.N.C. 1972).

Alternatively, if plaintiffs' claim is that service upon defendant Kissinger was effected by service upon his agent, that claim must also fail. For Mr. Szopa is not and has never been ". . . an agent authorized by appontment or by law to receive service of process"on behalf of defendant Kissinger in his individual capacity, as required by Rule 4(d)(1). See Nelson v. Swift, 271 F.2d 514, 515 (D.C. Cir. 1959); Schultz v. Schultz, 436 F.2d 635 (7th Cir. 1971). Thus, effective service was not made upon defendant Kissinger by leaving a copy with Mr. Szopa.

Finally, service of process upon the defendant in his present official capacity as Secretary of State is likewise insufficient to confer in personam jurisdiction over the defendant in his individual capacity. When a suit is brought against an official in his individual capacity, Rule 4(d)(5) does not govern service of process.

14/ (footnote continued from previous page)
capacity [Comp. at ¶ 5], they do not allege any acts taken by him in that capacity in the alleged electronic surveillance. As such, plaintiffs do not state a claim for relief against the Secretary of State and dismissal is also required for that reason. Rule 12(b)(6), F.R.Civ.P.

Rather, service must be made under Rule 4(d)(1), i.e., he must be personally served. Griffith v. Nixon, 518 F.2d 1195 (2d Cir. 1975); Mecartney v. Hoover, 151 F.2d 694 (7th Cir. 1945); Sun Life Assurance Co. v. McGrath, 13 F.R.D. 22 (N.D. Ill. 1952); Rabiolo v. Weinstein, 357 F.2d 167 (7th Cir. 1966).

It is submitted that the failure of plaintiffs to effect service upon defendant Kissinger in conformance with the provisions of Rule 4(d)(1), precludes this Court from acquiring jurisdiction over him in his individual capacity for purposes of entering a binding judgment.

CONCLUSION

Accordingly, for the foregoing reasons, Federal defendants urge the Court to dismiss the complaint as time-barred by the running of the limitations period, and defendant Kissinger urges the Court to conclude that it lacks in personam jurisdiction over the defendant in his individual capacity because of insufficiency of service of process.

Respectfully submitted,

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